BUILDING AND CONSTRUCTION TRADES COUNCIL
OF NORTHERN NEVADA ET AL.

IBLA 97-81, 97-82 Decided April 25, 1997

Appeals from a decision of the Battle Mountain, Nevada, District Manager, Bureau of Land Management, approving mining plan of operations N64-92-001P.

Appeal dismissed in IBLA 97-81; decision affirmed in IBLA 97-82.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Notice of Appeal

   An appeal initiated with a notice filed by a consultant is invalid when it is not made by a lawyer, officer, or full-time employee of the organization on whose behalf it is filed; dismissal is required.

2. Environmental Quality: Environmental Statements--Mineral Lands: Environment--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

   An owner of property near a proposed mine haul road was given adequate opportunity to participate in preparation of an EIS for a mining project in Nevada when use of the road was raised during preparation of a draft EIS but after an initial scoping meeting; her concerns about socioeconomic effects of the road were adequately addressed in the EIS, which considered safety, health, and economic aspects of the mine transportation system.

APPEARANCES: John P. Williams, Portland, Oregon, and Richard Houts, Jr., Reno, Nevada, for Building and Construction Trades Council of Northern Nevada; Roberta L. McGonagle, Battle Mountain, Nevada, pro se; John F. Shepherd, Esq., Denver, Colorado, for Santa Fe Pacific Gold Corporation.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Building and Construction Trades Council of Northern Nevada (Council) and Roberta L. McGonagle have appealed from an October 29, 1996, Record of Decision approving mining plan of operations N64-92-001P issued by the Battle Mountain, Nevada, District Manager, Bureau of Land Management (BLM); the approved plan allows operations by Santa Fe Pacific Gold Corporation

(Santa Fe) at the Mule Canyon Mine in Lander County, Nevada. Statements of reasons (SOR) have been filed in support of both appeals. Additionally, Council has requested a stay of the BLM decision pending appeal, pursuant to Departmental stay regulation 43 C.F.R. § 4.21, and has filed a supplemental SOR. A motion to dismiss Council's appeal and an answer to McGonagle's SOR were filed by Santa Fe on December 6, and 26, 1996. These appeals are consolidated for decision in the interest of administrative economy because they arise together and involve the same basic record.

THE COUNCIL APPEAL, IBLA 97-81

Council's stay request is considered first: On November 25, 1996, a notice of appeal and request for stay were filed with BLM by John P. Williams, said by the notice to be a "consultant" acting on behalf of Council, which is identified as an "organization of skilled workers." A supporting SOR was filed by Richard Houts, Jr., the Secretary-Treasurer of Council, on December 23, 1996. Because our review reveals that Council did not file a valid and timely notice of appeal, the appeal must be dismissed.

Under 43 C.F.R. § 1.3(b), one cannot practice before the Department on behalf of an organization such as Council unless one is a practicing lawyer, or has been formally admitted to practice before the Department under prior regulations, or is an officer or full-time employee of the organization. The term "practice" is defined by 43 C.F.R. § 1.2(c) to include any action taken to assert a right before the Department; one who files a notice of appeal from a BLM decision is practicing before the Department. Southern Utah Wilderness Alliance, (SUWA) 108 IBLA 318, 321 (1989). Santa Fe has moved to dismiss the appeal filed by Williams, citing the SUWA opinion for the proposition that an attempt to file an appeal with Interior Board of Land Appeals (IBLA) by a person not authorized to practice before the Department is invalid.

On February 24 and 25, 1997, Council responded to the motion to dismiss by filing a supplemental SOR and an affidavit by Houts. Houts explains that Williams is not an attorney, but argues he should be treated as though he were a full-time Council employee because he has been a "paid employee" of Council "since March 1996" who has "frequently worked 40 hours a week." Even if Williams is not a full-time employee, Houts contends, the fact that there was a "prompt follow-up" by an officer of the organization with an SOR in support of the Williams notice should cure any defect in the notice itself.

This argument must, however, be rejected. An appeal to IBLA is initiated by filing a notice of appeal with the BLM office making the decision from which appeal is taken. 43 C.F.R. § 4.411(a). The filing must be made within 30 days of service of the decision at issue. Id. The time for filing cannot be extended. Id. at § 4.411(c). While no special form of notice is required, (see 43 C.F.R. § 4.411(b)), if the SOR filed by Houts were to be treated as a notice of appeal, it must have been filed within the 30-day period allowed by regulation, and it must have been filed with the BLM office making the decision appealed from.

The document filed by Houts on December 23, 1996, does not meet those criteria: First, it was filed with this Board instead of the deciding official. In his supplement to the SOR, filed herein on February 24, 1997, Houts acknowledges that he did not file the SOR with the deciding official, but states that "this oversight has been corrected." It is not clear, however, when this correction took place, but it was apparently not until after Santa Fe moved to dismiss the Council appeal. The SOR was received by IBLA 28 days after the notice filed by Williams was received by BLM, and 55 days after BLM issued the decision sought to be appealed; Council does not argue that it was timely filed, and has not shown how it could have been, but suggests only that no prejudice to Santa Fe has been shown.

Whether or not Santa Fe will be prejudiced by the delay inherent in the procedure used by Council in this case, the question is not merely procedural but goes to the authority of IBLA to entertain the Council appeal. Without a properly filed notice of appeal, there can be no appeal: The jurisdiction of IBLA to consider an appeal depends, in all cases, on the existence of a valid notice of appeal. See BLM v. Fallini, 136 IBLA 345, 348 (1996), is also a case involving a tardy appeal that required dismissal, in which the notice was not filed with the deciding official but rather with this Board. As was true in Fallini, the SOR filed by Houts in December 1996 does not meet the standards set for notices of appeal by Departmental regulation and may not, therefore, be substituted for the notice filed in November 1996 by Williams.

[1] Whether we may entertain this appeal depends on whether Williams was a full-time employee of Council, so that, under 43 C.F.R. § 1.3(b), the document he filed in November 1996 could begin an appeal before us. The term "full-time employee" is not further defined by the rule, but necessarily excludes part-time or temporary hires. As Santa Fe points out, the circumstances surrounding Williams' initial appearance for Council do not lend themselves to a finding that he was a full-time employee of that organization. Unlike Houts, he did not use Council stationary for filing his notice, but used his own, which bears a Portland, Oregon, address. The Council stationery used by Houts shows that Council's office is located in Reno, Nevada, where it is affiliated with the Nevada State AFL-CIO; this indicates that Williams does not use the Council office on a regular basis.

Williams, moreover, did not claim to be an employee, but twice stated in the notice he filed that he was a "consultant" to Council, indicating he was hired as an expert to provide advice in some professional capacity, in much the same way as a lawyer would be hired to advise concerning a legal problem. Documents provided by Santa Fe indicate that Williams also represents a group known as Legal and Safety Employer Research Inc., a circumstance indicating that he has other clients besides Council for whom he acts in a consulting capacity, and which tends to exclude the possibility that he might be a full-time employee of Council. As Santa Fe points out, if Williams were employed full-time by Council, that fact should be easily demonstrated, and would depend, not on the number of hours worked or the amount paid him, but whether he was regularly employed by the organization on a full-time basis, rather than as a temporary hire working on a specialized task.

The record before us leads to a conclusion that Williams was not a person qualified to practice before the Department because he was neither a lawyer, nor an officer, nor a full-time employee of Council when he filed his notice in November 1996. As a result, the document he filed was not a valid notice of appeal under applicable Departmental regulations, and the appeal filed by Council must be dismissed. See 43 C.F.R. §§ 1.3 and 4.411(a); SUWA, supra.

THE MCGONAGLE APPEAL, IBLA 97-82

McGonagle also challenges the action taken on October 29, 1996, when BLM approved Santa Fe's Mule Canyon mine plan of operations. She alleges that the "decision is flawed because the [Final Mule Canyon Mine] Environmental Impact Statement [EIS] fails to adequately analyze socio-economic effects of use of Airport Road (frontage road) for heavy truck traffic hauling ore to process at Twin Creeks Mine north of Golconda, Nevada." She argues that BLM planning for the road in question was procedurally infirm and failed to conform to standards imposed by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), inasmuch as the road proposal was not included in planning documents until the EIS was in draft form (DEIS). She contends that safety concerns about the road are not addressed in the EIS, which fails to analyze feasible alternative routes and socioeconomic effects of Airport Road on Battle Mountain property owners and residents.

As McGonagle states, and the EIS reports, use of Airport Road as a haul road was not discussed at early scoping meetings. The EIS explains, referring to an earlier comment made to BLM by McGonagle, that she:

> [I]s correct in noting that ore haulage was not discussed during the Public Scoping Meetings. As a result of overall review of [Santa Fe] operations in Northern Nevada, [Santa Fe] modified the Proposed Action during preparation of the DEIS. Mine-related transportation considerations and potential impacts, including the use of the existing road network, are presented and discussed in * * * the DEIS. Modification of a Proposed Action during preparation of the DEIS is allowable under NEPA since the DEIS provides a reasonable mechanism for public review and comment on any changes. The purpose of the Public Scoping Meetings is to present the Proposed Action and elicit questions or comments as a basis for identification of issues and determination of the level of analysis for the DEIS. The DEIS was presented in a public meeting on June 5 and ore haulage considerations and related potential impacts were noted and discussed.

(EIS at 133.)

[2] As the passage from the EIS quoted above demonstrates, McGonagle was not prevented from commenting on the proposed haul road uses, and her comments concerning use of Airport Road were specifically considered by the EIS. There is no requirement in NEPA or implementing regulations

that prevents a proposed action from being modified during the planning process; such a requirement would inhibit a declared purpose of the Act that planning be used as an aid to decisionmaking. See generally 42 U.S.C. § 4331(b) (1994). The EIS correctly concluded that the road issue was properly considered by BLM, despite the fact it was not discussed at the initial scoping meeting.

McGonagle's concerns about safety and property values were addressed in the DEIS pages 4-71 through 4-75, and in Chapter 4 of the EIS on pages 1 (dust), 3 through 5 (safety and design), and 6 through 7 (location). The responses provided indicate that comments from McGonagle and others were considered, and that the final plan was developed in cooperation with County officials from the area concerned during the planning process. The choice made has not been shown to be without foundation in the EIS.

As to whether feasible alternatives to use of Airport Road were considered, the EIS considers and rejects a number of alternatives on page 2-7, including the two possibilities suggested by McGonagle's SOR which were rejected for economic reasons. Finally, her allegation that general socioeconomic impacts upon property owners in Battle Mountain were ignored does not bear scrutiny. These matters were considered in the EIS on pages 4-71 through 4-78, as part of a discussion of the nature and extent of mine traffic and an analysis of the effects of transportation uses in connection with mine operations on the Battle Mountain area. The discussion of truck traffic considers the effects of increased traffic, dust, and noise on the area; the analysis made addresses the questions raised herein by McGonagle.

The EIS has not been shown by McGonagle to be inconsistent with standards imposed by NEPA for environmental statements. See 43 U.S.C. § 4332(2)(C) (1994). We find that BLM properly approved the Mule Canyon Mine plan of operations based upon information gathered in the EIS and other supporting planning documents prepared in connection with the project.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal filed by Council in IBLA 97-81 is dismissed, and the Decision appealed from by McGonagle in IBLA 97-82 is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge